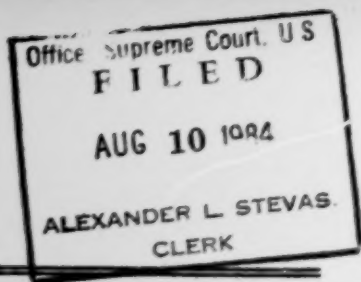


84-252<sup>(2)</sup>



NO.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

ANN SHAVERS,

Petitioner

v.

WALTER E. HELLER & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI  
(APPENDICES)

GEORGE F. BLOSS, III, P.A.  
Attorney for Petitioner  
1400 24th Avenue, Suite 301  
Post Office Box 177  
Gulfport, Mississippi 39502  
(601) 868-8660

7099



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 83-1683

---

WALTER E. HELLER & COMPANY,  
Plaintiff-Appellee,

versus

TYGER EQUIPMENT-INTERNATIONAL,  
INC., ET AL.,  
Defendants,

ANN SHAVERS,  
Defendant-Appellant.

-----  
Appeal from the United States District  
Court for the Northern District of Texas  
-----

ON PETITION FOR REHEARING AND SUGGESTION  
FOR REHEARING EN BANC

(Opinion APRIL 19, 5 Cir., 1984, \_\_\_\_ F.2d  
\_\_\_\_)  
( May 16, 1984 )

Before GEE, POLITZ and JOHNSON, Circuit  
Judges

( ) The Petition for Rehearing is DENIED  
and no member of this panel nor Judge in  
regular active service on the Court  
having requested that the Court be polled  
on rehearing en banc, (Federal Rules of  
Appellate Procedure and Local Rule 35)  
the Suggestion for Rehearing En Banc is  
DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ  
United States Circuit Judge

APPENDIX B  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 83-1683  
Summary Calendar

---

WALTER E. HELLER & COMPANY,  
Plaintiff-Appellee,  
versus  
TYGER EQUIPMENT-INTERNATIONAL, INC.,  
ET AL.,  
Defendants,  
ANN SHAVERS,  
Defendant-Appellant.

---

Appeal from the United States District  
Court for the Northern District of Texas

---

( APRIL 19, 1984 )

Before GEE, POLITZ and JOHNSON, Circuit  
Judges.

POLITZ, Circuit Judge:

Ann B. Shavers appeals the denial of  
her motion for relief from a default judg-  
ment. Fed.R.Civ.P. 60(b). Finding no  
abuse of discretion by the trial court,  
we affirm.

Facts and Procedural Background

Walter E. Heller & Company sued

several defendants, including Hercules Concrete Pumps, Inc., Ann Shavers and her husband John Shavers, for breaches of leases and guaranties, fraud, negligent misrepresentation and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. The suit was based on two transactions in Texas involving Heller and Hercules. In May of 1983 Hercules was made the subject of an involuntary bankruptcy by its creditors. John Shavers immediately filed a voluntary petition in bankruptcy.

On May 5, 1983 Ann Shavers was personally served with the complaint. Service was also effected through the Secretary of State of Texas on May 19, 1983. She filed no response. On June 10, 1983, appellee filed its Motion for Default Judgment against Ann Shavers. A copy of the motion and a copy of the proposed judgment were forwarded to Ann

Shavers by certified mail but she refused to accept the package. In doing so, she followed the lead of her husband who refused certified mail from plaintiff's counsel from April 21, 1983 to June 15, 1983.

On July 1, 1983 appellee sought and secured a final judgment. Twenty-six days later Ann Shavers filed an appearance and answer. Thereafter she filed her Motion to Vacate Service of Process and to Set Aside Default Judgment.

At the time of the transaction upon which this litigation is based, Ann Shavers was Secretary of Hercules. John Shavers was its President. Ann Shavers traveled from her home in Mississippi to Texas on several occasions in conjunction with the business between Hercules and Heller. She conducted banking business for Hercules in Houston. She traveled to Dallas in the company plane to meet with



business associates. Hercules sold equipment in Texas, including the equipment which is at the core of this suit.

### Discussion

A motion for relief from judgment under Rule 60(b) is addressed to the sound discretion of the district court. Hand v. United States, 441 F.2d 529 (5th Cir. 1971). The district court will be upheld absent a clear showing of abuse. Whittlesey v. Weyerhaeuser, 640 F.2d 739 (5th Cir. 1981). Shavers claims entitlement to relief under either 60(b)(1) or 60(b)(6). Those sections provide in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

The district court has wide discretion in entering a default judgment. Mason v.

Lister, 562 F.2d 343 (5th Cir. 1977). Before such a judgment will be vacated under Rule 60(b), the moving party "must show that there was good reason for the default and that he has a meritorious defense to the action." Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970).

Appellant claims that she was justified in her failure to respond timely. She maintains that she was without counsel and that she was ignorant of the processes of law and its requirements. She also claims personal and family stresses and distractions justified her inaction. The record belies these contentions. Appellant is college-educated with a background and experience in business matters. At the time of the instant default she was engaged in the pursuit of other legal and business affairs. The record does not support a finding of excusable neglect, mistake, inadvertence or surprise.

Appellant alternatively contends that she is entitled to relief under Rule 60(b)(6), the justice and equity provision. Transit Cas. Co. v. Security Trust Co., 441 F.2d 788 (5th Cir. 1971). Mindful of the liberal construction required to do substantial justice, Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), we examine appellant's contentions in light of the record facts.

Shavers maintains that the court lacks personal jurisdiction. This contention is totally devoid of merit. In this diversity action, jurisdiction is based on the Texas Long Arm Statute, Texas Revised Civil Statutes, art. 2031(b):

For the purpose of this act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this state by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in

this State, or the committing of any tort in whole or in part in this state. . . .

The Texas Supreme Court and this court have recognized that art. 2031(b) extends to the full limits allowed by the due process clause and it is not necessary that the suit arise out of the defendant's contacts with the forum "when the nonresident defendant's presence in the forum through numerous contacts is of such a nature . . . so as to satisfy the demands of the ultimate test of due process."

Placid Investments, Ltd. v. Girard Trust Bank, 689 F.2d 1218, 1219 (5th Cir. 1982), quoting Hall v. Helicopteros Nacionales de Colombia, 638 S.W.2d 870, 872 (Tex. 1982).

It is apparent that appellant was doing business in Texas for purposes of the Texas Long Arm Statute. Furthermore, the due process strictures are satisfied. As we recently noted:

When a defendant purposefully avails himself of the benefits

and protections of the forum's laws -- by engaging in activity in the state or engaging in activity outside the state that has reasonably foreseeable consequences in the state -- maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice.

Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1268 (5th Cir. 1981).

Finally, appellant claims improper service of process. This claim also is without merit. She was served personally and through the Secretary of State of Texas. Finding no merit in any contention and no abuse of discretion by the trial judge, see, Alvestad v. Monsanto, 671 F.2d 908 (5th Cir. 1982), we affirm the district court.

WALTER E. HELLER & COMPANY )  
 ) CA 3-83-  
 vs. ) 0253-C  
 )  
 TYGER EQUIPMENT-INTERNATIONAL, )  
 INC., ET AL )

The Court having considered Defendant Ann Shavers' Motion to Vacate Service of Process and to Set Aside Default Judgment, the response of the Plaintiff, and the briefs and supporting materials of the Parties and finding Defendant Ann Shavers has done business in Texas and that she has shown insufficient excuse for her failure to obey the summons of the Court,

Defendant Ann Shavers' Motion to  
Vacate Service of Process and to Set Aside  
Default Judgment is denied.

9/15/83                      /s/ W.M. TAYLOR, JR.  
Date                              UNITED STATES DISTRICT  
   JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	)	
AND COMPANY	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	
TYGER EQUIPMENT-	)	3 83-0253 C
INTERNATIONAL, INC.,	)	
TED Y. HATCH, indivi-	)	
dually and d/b/a	)	
TYGER QUIP OPERATIONS	)	
and/or B&H PROPERTIES,	)	
TYGERPUMP SERVICES,	)	
INC., TYGER QUIP	)	
OPERATIONS, B & H	)	
PROPERTIES, HERCULES	)	
CONCRETE PUMPS, INC.,	)	
JOHN SHAVERS, and	)	
ANN SHAVERS,	)	
Defendants	)	

FINAL JUDGMENT

On this the 1st day of July, 1983,  
came on to be heard Plaintiff Walter E.  
Heller and Company's Motion for Entry of  
Final Judgment as to Defendant Ann Shavers,  
pursuant to Rule 54(b), Fed.R.Civ.P. The  
Court having considered the Motion, the  
argument of counsel, and the pleadings and  
other records on file herein, finds that

Defendants Ann Shavers, John Shavers and Hercules Concrete Pumps, Inc. have engaged in a deliberate course of conduct designed to obstruct and impede the prosecution of this case; that delaying entry of final judgment against Ann Shavers until final trial as to the remaining Defendants in the case would create a probable danger that Defendant Ann Shavers would conceal, waste or otherwise dispose of assets available to satisfy Plaintiff's claims, and that Plaintiff would suffer prejudice from the delay of entry of final judgment. Therefore, the Court expressly determines that there is no just reason for delay in entering final judgment against Defendant Ann Shavers and expressly directs the entry of final judgment against Defendant Ann Shavers as set forth herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Walter E.



Heller and Company recover of Defendant Ann Shavers the sum of \$2,425,593.72, reasonable attorneys fees and expenses in the amount of \$90,471.32, and all costs of the action, with interest on these sums at the rate of 9.59% per annum from the 1st day of July, 1983 until paid.

SIGNED AND ENTERED this 1st day of July, 1983.

/s/ W. M. TAYLOR, JR.  
UNITED STATES DISTRICT JUDGE

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	)	
AND COMPANY	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
TYGER EQUIPMENT-	)	
INTERNATIONAL, INC.,	)	3 83-0253 C
TED Y. HATCH, indi-	)	
vidually and d/b/a	)	
TYGER QUIP OPERATIONS	)	
and/or B&H PROPERTIES,	)	
TYGERPUMP SERVICES,	)	
INC., TYGER QUIP	)	
OPERATIONS, B & H	)	
PROPERTIES, HERCULES	)	
CONCRETE PUMPS, INC.,	)	
JOHN SHAVERS, and	)	
ANN SHAVERS,	)	
Defendants	)	

ORDER

On this the 1st day of July, 1983,  
came on for consideration the recommenda-  
tion of the United States Magistrate con-  
cerning the determination of the damages  
and attorneys fees to which Plaintiff is  
entitled against Defendant Ann Shavers,  
against whom a default was entered by the  
Clerk of this Court on June 10, 1983, and

the Court having considered the recommendation of the United States Magistrate is of the opinion that same should be approved.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Walter E. Heller & Company recover of Defendant Ann Shavers the sum of \$2,425,593.72, attorneys fees in the amount of \$90,471.32, costs of the action, with interest on these sums at the rate of 9.59% per annum from the 1st day of July, 1983 until paid.

SIGNED AND ENTERED this 1st day of July, 1983.

/s/ W. M. TAYLOR, JR.  
U. S. DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	)	
& COMPANY	)	
	)	
VS.	)	CIVIL NO.
	)	
TYGER EQUIPMENT-	)	CA-3-83-0253-C
INTERNATIONAL, INC.,	)	
ET AL	)	

RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE

Under authority of 28 U.S.C. §636(B) and the Local Rules of this Court, this action has been referred to the undersigned Magistrate for hearing and determination of the damages and attorneys' fees to which plaintiff is entitled against the defendant Ann Shavers, against whom a default was entered by the Clerk of this Court on June 10, 1983. A hearing was convened at 1:30 p.m. on June 24, 1983 as ordered by the Court in its Order of June 14, 1983, and only plaintiff appeared. Plaintiff presented testimony

by the Assistant Vice President of the plaintiff Walter E. Heller & Company who was responsible for the account which is the subject matter of this action. Testimony by that witness established that plaintiff suffered actual damages in the amount of \$808,531.24, and that plaintiff further incurred attorneys' fees and direct expenses in the amount of \$90,471.32 in the presentation and prosecution of this action. Testimony by Margaret Vandervalk, one of the attorneys for plaintiff established that Dallas counsel had performed legal work in this regard with a reasonable value of \$68,651.52, and a firm in Biloxi, Mississippi had performed further legal work which had a reasonable value of \$13,743. Counsel's testimony establishes that such amounts are reasonable and customary for like services performed by lawyers in Dallas and Biloxi, Mississippi. It thus

appears from the evidence that plaintiff's total damages, exclusive of attorneys' fees and expenses, are \$808,531.24.

Plaintiff brought this action alleging a pattern of racketeering activity as defined by 18 U.S.C. §1961(5). 18 U.S.C. §1964(c) provides that plaintiff in such a case shall be entitled to threefold the damages sustained and the costs of suit including a reasonable attorney's fee. Accordingly, plaintiff's actual damages of \$808,531.24, when trebled, amount to damages in the amount of \$2,425,593.72.

RECOMMENDATION:

I recommend that plaintiff be awarded damages in the amount of \$808,531.24 with such amount trebled pursuant to the provisions of 18 U.S.C. §1964(c) to an amount of \$2,425,593.72. I further recommend that plaintiff be awarded the sum of \$90,471.32 as reasonable attorneys' fees and expenses incurred in the preparation

and prosecution of this action.

SIGNED this 24th day of June, 1983.

/s/ John B. Toller  
UNITED STATES MAGISTRATE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

<u>WALTER E. HELLER</u>	)	
& COMPANY,	)	
Plaintiff,	)	
	)	
versus	)	C/A No. 3-83-0253-C
	)	
TYGER EQUIPMENT-	)	
INTERNATIONAL,	)	
INC., TED Y. HATCH,	)	
INDIVIDUALLY, AND	)	
D/B/A TYGER QUIP	)	
OPERATIONS AND B &	)	
H PROPERTIES, TYGER-	)	
PUMP SERVICES, INC.,	)	
HERCULES CONCRETE	)	
PUMPS, INC., JOHN	)	
SHAVERS AND ANN	)	
SHAVERS,	)	
Defendants.)	)	

MOTION OF ANN SHAVERS TO  
VACATE SERVICE OF PROCESS AND  
TO SET ASIDE DEFAULT JUDGMENT

COMES NOW, your Defendant, ANN  
SHAVERS, by and through her undersigned  
attorneys, and pursuant to Fed. R. Civ. P.  
60(b), respectfully moves this Honorable  
Court to set aside the Default Judgment  
rendered against her to vacate service of  
process and in support thereof would



respectfully show as follows, to-wit:

I.

That at the time that the Default Judgment was rendered against her, she was not represented by counsel; that she had no funds with which to pay and employ an attorney to represent her; that she attempted to act in her own behalf unknowingly, unwittingly, and inadvertently without advice of counsel, out of fear, and under great anxiety and apprehension, all of which contributed to her failure to appear without assistance of any legal counsel. That she now realizes her mistake and the severity of the effect the Default Judgment would have against her and her ability to raise her family which consists of one child, 11 years of age, and would impair her ability to earn a living. After having obtained legal counsel on this date, she now realizes her mistake in failing to appear, which

at the time of the rendition of the Judgment, she was mentally, physically, and financially unable to make an appearance with or without counsel on her behalf. That she was totally unaware of the legal aspects in the case against her in that she had no legal experience or training; that she was unaware that the process had upon her individually by way of substitute process was void; that she was totally ignorant and mistaken regarding the allegations that she was and had been at all times mentioned in the Complaint doing business individually within the State of Texas, particularly within the jurisdiction of this Honorable Court; that she was totally ignorant of the fact that she had a valid, legal defense to any judgment that may be brought against her individually due to the fact that she was not doing business in the State of Texas and amenable to

process and that venue was improper as to her individually; that upon a final hearing on this Motion, she desires to show by way of proof that she has never done business within the State of Texas nor within the jurisdiction of this Honorable Court as an individual; and that she has a valid and meritorious defense to this suit. Your Defendant, ANN SHAVERS, would further show that any business that she had within the State of Texas for and on behalf of the Defendant, HERCULES CONCRETE PUMPS, INC., was done at the instance and request of the president of HERCULES CONCRETE PUMPS, INC., consisting of nothing more than delivering papers, messages, etc., and did not engage in any policy- or decision-making actively at any time within the State of Texas for and on behalf of HERCULES CONCRETE PUMPS, INC. That the Judgment is unjust, inequitable, contrary to law, and unsupported by cogent

and reliable evidence, and it is against equity and good conscience to allow it to stand and be enforced [sic]. That the Judgment was obtained by HELLER for harassment [sic]. That the Plaintiff made the allegations against your Defendant in the Complaint in Paragraphs III(29-30) and (38-39) "on information and belief," which were unsupported allegations made by the Plaintiff.

In Paragraph III (38) the Plaintiff charged the Defendant with the violation of 18 U.S.C. §1961(5) all allegations being on information and belief and obviously unsupported by cogent evidence and all made in the reckless disregard for the truth and in a reckless disregard for the Defendant's rights and done with a willful and malicious intent to threaten, harass [sic], and intimidate your Defendant in an attempt to collect treble damages from your Defendant and as a devious legal

devise [sic] on the Plaintiff's part in an unlawful and fraudulent scheme to get process on her and to bring within the jurisdiction of this Honorable Court as to process and venue by pleading 18 U.S.C. §1965.

Your Defendant would further show that the allegations contained in the Complaint are totally inadequate and insufficient to support the allegation of a violation by your Defendant of 18 U.S.C. §1961(5), and that all such allegations in violation of said section should be stricken.

For said reasons, she respectfully moves the Court to set aside the Default Judgment on the foregoing grounds and reasons, in that the Court had no in personam jurisdiction over her and that the venue of the court was improper and had no jurisdiction over the subject matter of the suit as to her individually.

WHEREFORE, PREMISES CONSIDERED, your Defendant, ANN SHAVERS, respectfully moves this Honorable Court to set aside the Default Judgment against her and to vacate service of process.

Respectfully submitted,

ANN SHAVERS, Defendant

BY: /s/ Oscar B. Ladner  
OSCAR B. LADNER  
Attorney for the Defendant

CERTIFICATE

I, Oscar B. Ladner, do hereby certify that I have this day mailed a true and correct copy of the within and foregoing Answer to the following:

1. Akin, Sump, Strauss, Hauer & Feld, counsel for the Plaintiff, at their usual post office address of 288 Republic Bank Dallas Building, Dallas, TX 75201;
2. Honorable James Persons, counsel for the Plaintiff, at his usual post office address of P. O. Box 1204, Biloxi, MS 39533;
3. Mr. Ted Y. Hatch, Defendant, at his usual post office address of 1306 Pine Tree Road, Suite 101, Longview, TX 75606;
4. Mr. John Shavers, Defendant, at his usual post office address of Highway 49 North, Gulfport, MS 39503; and

5. Honorable William Rigdon, counsel for the Defendant, JOHN SHAVERS, at his usual post office address of P. O. Box 2873, Laurel, MS 39440.

This, the 29th day of July, 1983.

/s/ Oscar B. Ladner  
OSCAR B. LADNER

OSCAR B. LADNER, P. A.  
Attorney and Counselor at Law  
A Professional Association  
2301 14th Street, Suites 206-207  
Security-Markham Building  
P. O. Box 727  
Gulfport, MS 39501-0053  
(601) 864-3926

OF COUNSEL:

HONORABLE G. DON SWAIN  
LOUIS SANDBOATE, P. C.  
Capital Bank Building, Suite 701  
Dallas, TX 75206  
(214) 823-2125

APPENDIX H

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	§	
& COMPANY,	§	
Plaintiff,	§	
	§	
VS.	§	
	§	CIVIL ACTION
	§	NO. CA3-83-0253-C
TYGER EQUIPMENT-	§	
INTERNATIWNAL, INC.,	§	
TED Y. HATCH, Indi-	§	
vidually and d/b/a	§	
TYGER QUIP OPERATIONS	§	
and/or B&H PROPERTIES,	§	
TYGERPUMP SERVICES,	§	
INC., TYGER QUIP	§	
OPERATIONS, B & H	§	
PROPERTIES, HERCULES	§	
CONCRETE PUMPS, INC.,	§	
JOHN SHAVERS, and	§	
ANN SHAVERS,	§	
Defendants.	§	

MOTION FOR DEFAULT JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Walter E. Heller & Company hereby moves the Court to enter Default Judgment in favor of Plaintiff and against Defendant Ann Shavers for damages as pleaded in Plaintiff's First Amended Original Complaint on file herein inclu-



ding interest, costs and attorney's fees, and in support thereof would show the Court as follows:

1. The Clerk's Entry of Default has been entered into the Court's docket pursuant to Rule 55(a), Fed.R.Civ.Pro., and is incorporated by reference for all purposes as if fully set forth herein;

2. The Defendant Ann Shavers is not in the military service of the United States, as is shown by the Affidavit of Margaret L. Vandervalk, attached hereto as Exhibit "A".

3. In view of the default of Defendant Tygerpump Services, Inc., the only issues remaining to be determined as to said Defendant are:

- (a) The amount of Plaintiff's damages; and
- (b) Plaintiff's claim for allowance of Plaintiff's attorney's fees.

See Trans World Airlines, Inc. v. Hughes,  
449 F.2d 51, 70 (2d Cir. 1971), rev'd on  
other grounds, 409 U.S. 363 (1973).

Accordingly, Plaintiff moves the  
Court to determine Plaintiff's damages  
and attorney's fees upon a hearing and  
to order entry of a judgment in favor of  
the Plaintiff against Defendant Ann  
Shavers, by reason of the matters and  
things alleged by Plaintiff in its First  
Amended Original Complaint in the amount  
as determined at the aforesaid hearing.

Respectfully submitted,

AKIN, GUMP, STRAUSS, HAUER  
& FELD

By: /s/ Sarah L. Scharnberg  
Michael P. Lynn  
Margaret L. Vandervalk  
Sarah L. Scharnberg

2800 RepublicBank-Dallas  
Bldg.  
Dallas, Texas 75201  
(214) 655-2800

ATTORNEYS FOR PLAINTIFF  
WALTER E. HELLER & COMPANY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Default Judgment has been served on Defendant Ann Shavers by mailing a copy of same by certified mail, return receipt requested, to her at her residence, 4 Willow Circle, Route 6, Gulfport, Mississippi 79503, on this 10th day of June, 1983.

/s/ Sarah Scharnberg

APPENDIX I

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	§	
& COMPANY,	§	
Plaintiff,	§	
	§	
VS.	§	
	§	CIVIL ACTION
TYGER EQUIPMENT-	§	NO. CA3-83-0253-C
INTERNATIONAL, INC.,	§	
TED Y. HATCH, Indi-	§	
vidually and d/b/a	§	
TYGER QUIP OPERATIONS	§	
and/or B&H PROPERTIES,	§	
TYGERPUMP SERVICES,	§	
INC., TYGER QUIP	§	
OPERATIONS, B & H	§	
PROPERTIES, HERCULES	§	
CONCRETE PUMPS, INC.,	§	
JOHN SHAVERS, and	§	
ANN SHAVERS,	§	
Defendants.	§	

CLERK'S ENTRY OF DEFAULT

This matter is before me on Plaintiff  
Walter E. Heller & Company's Request to  
Clerk for Entry of Default. Plaintiff's  
request shows as follows:

1. Defendant Ann Shavers has been  
duly served with summons and complaint in  
this matter on May 19, 1983.

2. Defendant Ann Shavers has failed to plead or otherwise defend as required by the federal rules.

Accordingly, upon application of the Plaintiff Walter E. Heller & Company, Default is hereby entered against Defendant Ann Shavers.

SIGNED and ENTERED this 10th day of June, 1983.

NANCY HALL DOHERTY  
\_\_\_\_\_  
NANCY HALL DOHERTY,  
UNITED STATES DISTRICT  
CLERK

By: /s/ Marilyn Knehans

APPENDIX J

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

WALTER E. HELLER	§	
& COMPANY,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO.
	§	CA3-83-0253C
	§	(Jury Demanded)
TYGER EQUIPMENT-	§	
INTERNATIONAL, INC.,	§	
TED Y. HATCH, indi-	§	
vidually and d/b/a	§	
TYGER QUIP OPERATIONS	§	
and/or B&H PROPERTIES,	§	
TYGERPUMP SERVICES,	§	
INC., TYGER QUIP	§	
OPERATIONS, B & H	§	
PROPERTIES, HERCULES	§	
CONCRETE PUMPS, INC.,	§	
JOHN SHAVERS, and	§	
ANN SHAVERS,	§	
	§	
Defendants.	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

WALTER E. HELLER & COMPANY, plaintiff  
herein, files this its First Amended  
Complaint and would respectfully show the  
following:

I.

PARTIES AND SERVICE

1. Plaintiff WALTER E. HELLER & COMPANY ("HELLER") is a Delaware corporation with its principal place of business in Chicago, Illinois.

2. Defendant TYGER EQUIPMENT-INTERNATIONAL, INC. ("TYGER") is a Texas corporation with its principal place of business in Longview, Texas. It may be served with process by serving Ted Y. Hatch, its registered agent, at its registered office, 1306 Pine Tree Road, Suite 101, Longview, Texas.

3. Defendant TYGERPUMP SERVICES, INC. ("TYGERPUMP") is a Texas corporation with its principal place of business in Longview, Texas. It may be served with process by serving its registered agent Ted Y. Hatch at 304 Cherokee Street, Longview, Texas.

4. Defendant TED Y. HATCH ("HATCH") is the Chairman and Chief Executive Officer of defendant TYGER. He may be

served with process at his business address, 1306 Pine Tree Road, Suite 101, Longview, Texas. HATCH is sued individually and doing business as TYGER QUIP OPERATIONS and B&H PROPERTIES.

5. Upon information and belief, TYGER QUIP OPERATIONS is a sole proprietorship of Defendant HATCH and may be served with process by serving HATCH at his place of business, 304 Cherokee Street, Longview, Texas.

6. Upon information and belief, B&H Properties is a sole proprietorship of Defendant HATCH and may be served with process by serving HATCH at his place of business, 304 Cherokee Street, Longview, Texas.

7. Defendant HERCULES CONCRETE PUMPS, INC. ("HERCULES") is a foreign corporation engaging in business in Texas, but having neither a regular place of business nor a designated agent for



service in Texas. Therefore, it may be served with process by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev. Civ. Stat. Ann. The principal place of business of HERCULES is Highway 49 North, Gulfport, Mississippi 39503.

8. Defendant JOHN E. SHAVERS ("SHAVERS") is the President of Defendant HERCULES and an individual engaging in business in Texas, but having neither a regular place of business nor a designated agent for service in Texas. Therefore, he may be served by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev. Civ. Stat. Ann. Defendant SHAVERS' business address is Highway 49 North, Gulfport, Mississippi 39503.

9. Defendant ANN B. SHAVERS ("A. SHAVERS") was the secretary of Defendant HERCULES at all times pertinent hereto and is a director of Defendant HERCULES

and an individual engaging in business in Texas, but having neither a regular place of business nor a designated agent for service in Texas. Therefore, she may be served by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev.Civ.Stat.Ann. Defendant A. SHAVERS' business address is Highway 49 North, Gulfport, Mississippi 39503 and her residence address is 4 Willow Circle, Gulfport, Mississippi.

10. Alternatively, Plaintiff prays that, pursuant to Rule 4(c), Fed. R. Civ. P., this Court grant its application for alternative service.

## II.

### JURISDICTION AND VENUE

11. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1331.

12. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1332.

13. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1337.

14. Jurisdiction of this action is also vested in this Court under 18 U.S.C. §1964(c).

15. This Court also has pendent jurisdiction over the claims that arise out of the same facts and circumstances under the common law of the State of Texas.

16. Venue is proper in this district under 28 U.S.C. §§1391(a) (b) & (c), and 18 U.S.C. §1965.

### III.

#### FACTUAL BACKGROUND

17. TYGER is in the construction and/or concrete business and has been in that business for approximately two years. HERCULES sells heavy equipment. HELLER is the assignee of equipment leases involving HERCULES equipment leased to TYGER. These

leases were originally entered into by The Walter E. Heller & Company Trust No. 1 as Lessor. The Walter E. Heller & Company Trust No. 1 is an entity through which HELLER engages from time to time in tax benefit leases. Both HELLER and The Walter E. Heller & Company Trust No. 1 act through the same agents, representatives and employees. For the sake of simplicity the acts of HELLER as agent of The Walter E. Heller & Company Trust No. 1 will hereinafter be described as the acts of HELLER.

18. In June 1982, Western Capital Investments, Inc., a broker, contacted HELLER concerning a potential lease transaction. TYGER proposed that HELLER advance funds to purchase new concrete pumping equipment from HERCULES and lease it to TYGER.

19. Upon receiving the lease applications from TYGER, HELLER asked for and

received credit information from TYGER and from HATCH. Some of that information was obtained through the United States mails and by interstate and intrastate telephone conversations.

20. On or about July 30, 1982, HATCH signed Lease No. 096966. A true and correct copy of that lease is attached hereto as Exhibit "A" and is incorporated herein as if set forth in full. On or about August 3, 1982, HATCH signed a Personal Guaranty, guaranteeing performance of Lease No. 096966. A true and correct copy of that Guaranty is attached hereto as Exhibit "B" and is incorporated herein as if set forth in full.

21. On or about July 20, 1982, HERCULES allegedly transferred the equipment to TYGER. On or about August 5, 1982, HELLER purchased the property described in Lease No. 096966 and TYGER certified that the property, as described

in the lease had arrived.

22. On or about August 23, 1982, HATCH signed Lease No. 097020. A true and correct copy of that lease is attached hereto as Exhibit "C" and is incorporated herein as if set forth in full. On or about August 24, 1982, HATCH signed a Personal Guaranty, guaranteeing performance of Lease No. 097020. A true and correct copy of that Guaranty is attached hereto as Exhibit "C" and is incorporated herein as if set forth in full. On August 23, 1982, HATCH also certified that he had received the equipment described by Lease 097020 which allegedly had been transferred by HERCULES on or about August 19, 1982.

23. Prior to signing Lease Nos. 096966 and 097020, HELLER representatives located in Dallas, Texas, telephoned HERCULES in Mississippi to confirm that the equipment sold to TYGER was new and

indeed was being shipped to TYGER.

HERCULES, through its President Shavers confirmed to HELLER that the equipment in Lease Nos. 096966 and 097020 was new.

24. Prior to HELLER's acceptance of Lease No. 097020, HELLER asked to inspect the concrete pumping equipment to be leased under Lease No. 097020 which had allegedly already been transferred by HERCULES to TYGER. A representative of HELLER travelled to South Padre Island, Texas where SHAVERS and a representative of TYGER pointed out a piece of concrete pumping equipment which bore a label identifying it as the make, model and serial number of the HERCULES equipment covered by Lease No. 097020. Upon information and belief, the equipment shown the HELLER representative was actually a Schwing concrete pump with a stick-on HERCULES label affixed to it, which TYGER had leased from Hercules Concrete Pumping

Service, Inc., an entity unrelated to Defendant HERCULES.

25. Upon information and belief, TYGER and HATCH negotiated and entered the equipment leasing transactions with HELLER to acquire pumps to be used by TYGERPUMP, the entity which physically engages in concrete pumping work.

26. On or about December 1982, TYGER's rental checks were returned to HELLER showing insufficient funds to cover payment of the checks.

27. Upon investigation of TYGER's nonpayment, HELLER discovered that the new equipment purportedly the subject of Lease Nos. 096966 and 097020 and purportedly in the possession of TYGER was not the equipment TYGER had in its possession.

28. On information and belief, HELLER alleges that HERCULES, in collusion with TYGER and TYGERPUMP, either failed to transfer any equipment to TYGER or



transferred to TYGER used equipment with identification numbers indicating it was new equipment, or transferred new equipment to TYGER and thereafter aided TYGER in switching the identification to older equipment.

29. In either case, on information and belief, HATCH, SHAVERS and A. SHAVERS through TYGER, TYGERPUMP and HERCULES either had HELLER purchase non-existent or used equipment or substituted used equipment for the new equipment they represented that HELLER purchased and did so intentionally to defraud HELLER and other equipment leasing companies out of funds HELLER and others had invested.

30. Upon information and belief, HERCULES through SHAVERS and A. SHAVERS kicked back a portion of the equipment purchase price paid by HELLER and other equipment lessors to TYGER and HATCH by making payments to B&H Properties and/or

HATCH. Portions of those payments were in turn transferred to TYGER, TYGERPUMP, TYGER QUIP and HATCH personally. Also upon information and belief, SHAVERS and A. SHAVERS have received payments of funds from HERCULES that were paid to HERCULES by HELLER and other equipment lessors.

31. Plaintiff, on information and belief, alleges that Defendants have or will destroy documents relating to the above transactions.

#### IV.

##### CLAIMS FOR RELIEF

32. Breaches of Leases and Guaranties. Plaintiff incorporates herein by reference and realleges paragraphs 1 through 30.

33. Defendant TYGER failed to make the November 1, 1982 lease payment then due and owing on Lease No. 096966 and Lease No. 097020, and has failed and refused to make each and every monthly

payment since due under both leases, up to and including the time of filing of this cause of action. Its failure to make the monthly payments constitutes a breach of said lease agreements and an event of default under the leases.

34. Defendant TYGER has also, by its failure to make the monthly lease payments when due, incurred late payment penalties pursuant to the terms of the leases in the amount of \$916.60.

35. As a result of the above-described defaults, rentals for the entire lease term became due in accordance with the terms of Lease No. 096966 and Lease No. 097020 and the entire amount of the unpaid total rental for the balance of the term of each lease became immediately due without notice. Pursuant to the terms of the leases and the guaranty agreements, there are now due and payable by Defendants TYGER and HATCH rentals in the sum

of \$346,891.04 under Lease No. 096966, and \$362,527.24 under Lease No. 097020, and late charges in the amount of \$916.60 with interest on these sums at the highest legal rate (not to exceed 1-1/2% per month) from the date of default until judgment, for which plaintiff now seeks recovery.

36. Alternatively, if Plaintiff should recover possession of the equipment and re-lease or sell the equipment to a third party, Defendants TYGER and HATCH are liable, pursuant to the provisions of Section 16 of the leases, for (1) the deficiency of the balance of rental payments remaining after such re-lease or sale, (2) all costs and expenses of repossession and re-lease or sale of the equipment, (3) an amount equal to 20% of the equipment's original cost to Lessor as liquidated damages for Lessor's loss of its residual salvage value at the normal

expiration of the lease, and (4) amounts due under Section 17 of the lease for Lessor's loss of investment tax credits and depreciation deductions, plus interest at the highest legal rate (not to exceed 1-1/2%) on all such sums not paid from the date such sums are incurred until judgment.

37. In accordance with the terms of the lease agreement, Defendants TYGER and HATCH are liable to Plaintiff for expenses incurred by Plaintiff in connection with the enforcement of Plaintiff's remedies, including reasonable attorneys' fees (not less than 20% of the amount due) and all expenses of repossessing and disposing of the equipment, together with interest on such sums at the highest legal rate (not to exceed 1-1/2%) from the date such sums are due until paid. Said Defendants are also liable for reasonable attorneys' fees pursuant to the provisions of Tex.

Rev. Civ. Stat. Ann. Art. 2226.

38. Racketeer Influenced and Corrupt Organization Act (RICO).

Plaintiff incorporates herein by reference and realleges paragraphs 1 through 37.

39. Defendants' fraudulent acts, omissions, and misrepresentations in connection with the formation of the lease contracts and regarding the equipment leased, occurred, and were accomplished, by and through Defendants' use on numerous occasions of the instrumentalities of the mails and wires of interstate commerce in communicating with officers and agents of Plaintiff.

40. Defendant TYGER's fraudulent omissions and misrepresentations regarding its financial status and solvency and the nature of the equipment leased to TYGER were accomplished by and through TYGER's use of the instrumentalities of the mails and wires of interstate commerce on at

least two separate occasions. Such conduct is within the definition of "pattern of racketeering [sic] activity" under 18 U.S.C. §1961(5).

41. Defendant HATCH's fraudulent omissions and misrepresentations regarding his financial status and solvency and the nature of the equipment leased to TYGER were accomplished by and through HATCH's use of the instrumentalities of the mails and wires of interstate commerce on at least two separate occasions. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

42. Defendants HERCULES', SHAVERS' and A. SHAVERS' fraudulent omissions and misrepresentations regarding the existence and/or origin of the leased equipment were accomplished by and through their use of the instrumentalities of the mails and wires of interstate commerce on at lease

[sic] two separate occasions. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

43. Upon information and belief, Defendants engaged in similar fraudulent acts, omissions and misrepresentations in connection with the formation of lease contracts with other equipment lessors, including but not limited to Baldwin United Leasing Company, Dresser Leasing, Manufacturer's Hanover, First City Leasing of Houston, LEXCO Leasing Corporation, and Marine Bank of Milwaukee. Moreover, Defendants HERCULES, SHAVERS and A. SHAVERS engaged in a similar fraudulent scheme to defraud equipment lessors in connection with American Concrete Pumping, Inc. of Longview, Texas. These fraudulent acts, omissions and misrepresentations occurred, and were accomplished, by and through Defendants' use on numerous



occasions of the instrumentalities of the mails and wires of interstate commerce in communicating with these other equipment lessors. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

44. Upon information and belief, Defendants HATCH, SHAVERS and A. SHAVERS, through TYGER, TYGERPUMP and HERCULES, and American Concrete Pumping, Inc. engaged in a wide-ranging conspiracy to defraud equipment lessors by creating a fictitious market for Hercules concrete pumping equipment. TYGER and/or TYGERPUMP and American Concrete Pumping, Inc., either directly or through brokers, approached the lessors and requested that they buy new Hercules concrete pumping equipment and lease it to TYGER, TYGERPUMP and/or American Concrete Pumping, Inc. for use in their concrete pumping businesses. SHAVERS, A. SHAVERS and HERCULES would then sell to the equip-

ment lessors reconditioned and/or non-existent Hercules concrete pumping equipment which all parties -- HATCH, SHAVERS, A. SHAVERS, HATCH, TYGER, TYGERPUMP and American Concrete Pumping, Inc. -- falsely represented to be new, existing Hercules concrete pumping equipment. This fraudulent enterprise was funded at least in part with monies derived from the initial fraudulent sales of concrete pumping equipment.

45. Upon information and belief, Defendants received income, substantial benefits, and value derived, directly or indirectly, from the fraudulent acts complained of herein and used or invested, directly or indirectly, some part of such income, benefits, and value, or the proceeds thereof, in the acquisition of interests in, and/or in the establishment and/or operation of, an enterprise or enterprises engaged in interstate commerce

or whose activities affect interstate commerce, in violation of 18 U.S.C. §1962.

46. Upon information and belief, Defendants, through the fraudulent acts complained of herein, acquired or maintained, directly or indirectly, an interest in and/or control of an enterprise or enterprises engaged in, or whose activities affect, interstate commerce, in violation of 18 U.S.C. §1962.

47. Upon information and belief, from approximately June 1982 and continuously thereafter up to and including the date of the filing of this complaint, Defendants HATCH, SHAVERS and A. SHAVERS, individually and through Defendants TYGER, TYGERPUMP and HERCULES, did unlawfully, willingly, and knowingly agree and conspire to derive income fraudulently from Plaintiffs and others through a pattern of racketeering activity. Through this pattern of racketeering activity,

Defendants agreed and conspired to violate 18 U.S.C. §1962(a), (b) and (c).

48. As a direct and proximate consequence and by reason of the foregoing acts and practices, Plaintiff was injured in its business or property and suffered damages, including lost lease payments and lost profits in the amount of at least six hundred thousand dollars, which Plaintiffs are entitled to have trebled under 18 U.S.C. §1964(c). Pursuant to 18 U.S.C. §1964(c) Plaintiff is also entitled to recover its costs of suit and reasonable attorney's fees.

49. Common Law Fraud. Plaintiff incorporates paragraphs 1 through 48 as if set forth in full.

50. Defendants HATCH at TYGER and SHAVERS and A. SHAVERS at HERCULES misrepresented that HELLER was purchasing new equipment. HATCH and TYGER additionally misrepresented that the equipment

would be preserved, maintained and protected during the lease, and that HATCH and TYGER were financially sound and as represented on certain balance sheets supplied to Plaintiff.

51. The above statements were false, were made recklessly, willfully or with the intent to deceive.

52. The above statements were relied upon by the Plaintiff and caused Plaintiff damages in excess of \$10,000.00.

53. Plaintiff has suffered out-of-pocket damages of approximately \$500,000.00 plus loss of interest thereon.

54. Negligent Misrepresentations.  
HELLER incorporates paragraphs 1 through 53 as if set forth in full.

55. Alternatively, HELLER alleges that Defendants were under a duty of care to provide accurate information to Plaintiff and have been negligent in making representations of their financial

worth and well being, as well as the existence and/or condition and age of the equipment purportedly sold to HELLER, when they knew that those representations would be and were relied upon by HELLER in consummating the lease transactions.

56. As a proximate result of Defendants' negligent misrepresentations, Plaintiff has suffered damages in excess of \$10,000.00.

57. Exemplary Damages. Plaintiff incorporates paragraphs 1 through 56 as if set forth in full.

58. Defendants have acted with legal malice in defrauding HELLER, or alternatively, have acted with such gross negligence that Plaintiff is entitled to punitive damages of at least the following amounts:

TYGER	--	\$4,000,000.00
HERCULES	--	\$6,000,000.00
HATCH	--	\$2,000,000.00
SHAVERS	--	\$2,000,000.00
A. SHAVERS	--	\$2,000,000.00

59. Conspiracy to Aid and Abet

TYGER. Plaintiff incorporates paragraphs 1 through 56 as if set forth in full.

60. HATCH, TYGER and TYGERPUMP acting in conspiracy with SHAVERS, A. SHAVERS and HERCULES did conspire to defraud HELLER as more particularly described above and did defraud HELLER of lease payments, collateral, and money in excess of \$10,000.00.

61. Said conspiracy was willful and was engaged in with legal malice. Hence Plaintiff prays for punitive damages as set forth in paragraph 58.

62. Irreparable Injury. Plaintiff will suffer immediate and irreparable injury should the preliminary injunction prayed for hereinbelow not be granted in that Defendants, upon information and belief, have already conspired to conceal or dispose of some of the new equipment sold to Plaintiff, and if not enjoined

may secrete, waste or destroy Plaintiff's property and all records of their prior wrongdoing. Plaintiff has no adequate remedy at law.

63. Attorneys' Fees. Pursuant to the lease agreements, 18 U.S.C. §1964(c) and Article 2226 Tex. Rev. Civ. Stat. Ann., Plaintiff prays for reasonable and necessary attorneys' fees.

V.

PRAYER

64. For the above reasons, Plaintiff prays:

a. that Defendants be cited to appear.

b. that Defendants, their agents, employees, successors, assignees, and representatives be preliminarily and finally enjoined from directly or indirectly engaging in:

1. the destruction, secretion, alienation, removal, conversion, or



disposition of the property more particularly described on each lease;

2. the destruction, secretion, removal, or disposition of records and documents that relate to the above-described lease transactions; and further breaches of the above-described lease agreements, resulting in further pecuniary loss to Plaintiff in the form of lost rental payments and lost profits.

c. Because of Defendants' fraud against Plaintiff, the Court should impose a constructive trust for the benefit of Plaintiff on any proceeds from the monies Plaintiff paid to Defendant HERCULES, and as any proceeds from Defendants' sale, conversion, or other disposition of the leased equipment.

d. Upon trial, the Court award Plaintiff damages as requested above.

e. Upon trial, the Court award

Plaintiff treble damages as requested in paragraph 48 above.

f. Upon trial, the Court award punitive damages as requested above.

g. Upon trial, the Court award attorneys' fees and court costs as well as all pre and post trial interest as required by law.

h. Upon trial, the Court award other relief as to which Plaintiff may show itself entitled.

Respectfully submitted,

/s/ Margaret L. Vandervalk  
Michael P. Lynn  
Margaret L. Vandervalk  
Sarah Scharnberg

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Of Counsel:

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(601) 435-3632

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiff's First Amended Complaint, has been sent, by certified mail, return receipt requested, to Mr. Ted Y. Hatch, 211 East Methvin, Longview, Texas 75606, to Mr. John Shavers, Highway 49 North, Gulfport, Mississippi 39503, and to Mr. William Rigdon, P. O. Box 2873, Laurel, Mississippi 39440, on this 27th day of April, 1983.

/s/ Margaret L. Vandervalk  
Margaret L. Vandervalk

APPENDIX K

Fed. R. Civ. P. 54

RULE 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. [Omitted as not pertinent].

(d) Costs. [Omitted as not pertinent].

APPENDIX L

28 U.S.C.S. § 1292

§ 1292. Interlocutory decisions.

(a) [Omitted as not pertinent].

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) [Omitted as not pertinent].

(d) [Omitted as not pertinent].

APPENDIX M

FED. R. CIV. P. 60(b)

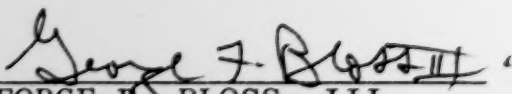
RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) [Omitted as not pertinent].

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CERTIFICATE OF SERVICE

I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing APPENDICES to Petition for Certiorari, with first class postage prepaid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for the respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 10<sup>th</sup> day of AUGUST, A.D. 1984.

  
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GEORGE F. BLOSS, III,  
Counsel for Petitioner

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